IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER, B. JOHN TUTUSKA,

*Appellants,*

*against*

M. RUSSELL TURLEY and ROBERT H. STIEVATER,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

## BRIEF FOR APPELLANTS LEFKOWITZ AND ROCKEFELLER

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### Opinions Below

The opinion of the single district judge ordering the convening of a three-judge district court (A. 49-52) is not reported. The opinion of the three-judge district court granting declaratory and injunctive relief (A. 55-64) is reported at 342 F. Supp. 544.

### Jurisdiction

The judgment and order of the District Court were entered on May 1, 1972 (A. 2). The notice of appeal was filed on June 29, 1972 (A. 2, 65). The jurisdictional state-

ment was filed on August 26, 1972. This Court noted probable jurisdiction on February 20, 1973.

The jurisdiction of this Court rests on 28 U.S.C. § 1253.

## Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution, as pertinent herein, provides:

> ". . . [N]or shall any person . . . be compelled in any criminal case to be a witness against himself. . . ."

New York General Municipal Law §§ 103-a, 103-b and New York Public Authorities Law, §§ 2601 and 2602, which were struck down by the Court below are set forth in the appendix to this brief at pages 22 to , *infra*.

## Questions Presented

1. Whether a public contract may constitutionally provide that a refusal to waive immunity with respect to the contract may result in loss of the contract and shall result in disqualification from contracting for five years.

2. Whether a public contractor may be disqualified from further contracts for five years on his refusal to waive immunity with respect to his contracts.

3. Whether the sweeping result announced below is justified by the record.

## Statement of the Case

Appellees brought this action for declaratory and injunctive relief against the continued enforcement of New York General Municipal Law, §§ 103-a, 103-b and New

York Public Authorities Law, §§ 2601 and 2602. These statutes provide, in essence, that every public contract shall contain a provision that, on the refusal of a contractor to waive immunity when called to testify "concerning any transaction or contract had with the state" or its subdivisions, agencies or authorities or on the refusal "to answer any relevant question concerning such transaction or contract", the person called and any business concern to which he belongs shall be disqualified from further contracting for five years after refusal. Moreover, any public contracts in effect at the time of the refusal may be cancelled on payment of monies owing for goods delivered or work done prior to the cancellation (N.Y. General Municipal Law, § 103-a; N.Y. Public Authorities Law, § 2601).

New York General Municipal Law, § 103-b and New York Public Authorities Law, § 2602 also provide for a five year disqualification from contracting on the failure to waive immunity or to testify* and provide in addition that the officer conducting the investigation must notify the appropriate authorities of the names of the persons refusing to waive or to testify and must also send notice of the names of the concerns to which such people belong.

Appellees are architects licensed to practice in the State of New York (A. 5). They were members of a partnership which, they claimed, had "various contracts" with Erie County, New York (A. 8), including one for the construction, in that county, of a domed stadium (A. 37). On February 8, 1971, while under County contract (A. 30), appellees were subpoenaed to testify before an Erie County grand jury respecting transactions and contracts that they

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* The disqualification provisions of §§ 103-b and 2602 were designed to cover past contracts in contrast to §§ 103-a and 2601 covering contracts in existence when the testimony is requested (N.Y. Legislative Annual, 1959, pp. 147, 148 [Memorandum of the Attorney General]).

had with the County (A. 6, 30, 39). Before being called before the grand jury, each was presented with a waiver of immunity which he was asked to sign (A. 6-7, 30). Each refused to sign the waiver (A. 7, 30) and neither was called to testify (A. 40). A third member of the partnership, J. Lloyd Walker, also refused to sign a waiver of immunity (A. 39). He was granted immunity and testified (A. 40).

Pursuant to N. Y. General Municipal Law, § 103-b, on February 9, 1971, Michael F. Dillon, the District Attorney of Erie County, notified the appellants Attorney General Lefkowitz and County Executive Tutuska, the Commissioner of Transportation of the State of New York, the Erie County Attorney and the Erie County Legislature of the refusals to waive immunity (A. 39-40).

On March 2, 1971, appellees commenced the present action alleging that the statutes in question violate the privilege against self-incrimination. They alleged that they had been in the past and expected in the future to be employed by various State agencies and subdivisions (A. 5), that they had been asked to and had refused to waive immunity (A. 7), that the appellant Tutuska "may" threaten to cancel or terminate various contracts between the County of Erie and the partnership of which plaintiffs were members on the grounds of General Municipal Law, § 103-a (A. 7-8), and that they as individuals or as members of a firm wished to enter into future public contracts (A. 8).

The District Attorney of Erie County was dismissed as a defendant on a finding by the single district judge that the case against him was moot since he had discharged his statutory obligations (A. 33-34). With respect to the remaining defendants, the single district judge found the complaint to set forth a substantial federal question and ordered the convening of a three-judge district court (A. 49-52).

With a paucity of reasoning and a dearth of facts, the Court granted the relief requested. Although recognizing that General Municipal Law, § 103-b had been upheld in *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd* 355 F. 2d 208 (2d Cir. 1966), the Court held, without further analysis, that *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men* v. *Commissioner*, 392 U.S. 280 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1966), and *Spevack* v. *Klein*, 385 U.S. 511 (1966) mandated a declaration of unconstitutionality because the statutes allegedly impose a penalty for assertion of the privilege against self-incrimination. Therefore, "[u]ntil rewritten so as to comply with constitutional standards" the statutes were declared unconstitutional and their enforcement was enjoined (A. 59).

## Summary of Argument

In providing for suspension from public contracting of contractors who decline to waive immunity with respect to their contracts (N.Y. General Municipal Law, §§ 103-a, 103-b; N.Y. Public Authorities Law, §§ 2601, 2602), New York has not impermissibly burdened the contractors' privilege against self-incrimination. The statutes are integral parts of a valid and important State program enacted in pursuit of honesty in public contracting. Unconditioned candor is not an unreasonable demand from someone seeking the benefit of State contracts. The possible termination of contracts and the five-year suspension from future contracting are precisely what contractors agree to in accepting the benefits of contracts. They thereby waive any complaint when the contract is sought to be enforced.

Moreover, contractors are in a position wholly different from that of public employees and licensees (*Gardner* v. *Broderick*, 392 U.S. 273 [1968]; *Spevack* v. *Klein*, 385 U.S. 511 [1966]). The contractor's obligation to account for

his transactions is at least as high as the public employee's obligation to account for the manner in which he discharges his duties and greater than any obligation of the licensee. At the same time, the contractor is not subject to the same consequences which befell the policeman in *Gardner* or the attorney in *Spevak*. He loses neither his living nor his license. He loses only certain business opportunities for a limited period of time. Furthermore, unlike the provision of the New York City Charter under which it was attempted to discharge the petitioner in *Gardner* v. *Broderick, supra,* the statutes in issue here limit the scope of a waiver to the subject matter of the special relationship, that is, the contract and transactions had with the State. The New York City Charter provision (§ 1123) is much broader in scope. Accordingly, while a prior waiver was not acceptable under the City Charter, it is permissible in this case.

The right asserted here must be evaluated by balancing the interests and consequences involved. Clearly, the balance favors the present scheme. The dilemma in which appellees purport to find themselves is of no constitutional significance under the circumstances of this case and no more serious than many other dilemmas which courts have found to give no right to relief.

Finally, the result below was not warranted by the record. Appellees did not claim to have any contracts with the State as individuals, claiming instead that their partnership had such contracts. Therefore, at least existing contracts could be cancelled without violating individual rights. The result below would also appear to include corporations notwithstanding that they have no privilege against self-incrimination.

The bulk of State services are rendered on contracts let through competitive bidding. It is not asking too much that the people who secure these contracts be open and candid about them and that they either give information freely and without reservation or forego them.

## POINT I

**The laws providing for cancellation of contracts and disqualification from contracting on a refusal to waive immunity establish valid contract provisions and do not violate the privilege against self-incrimination.**

The people who contract to provide goods and services to the State and its agencies and subdivisions receive a considerable percentage of the State fisc. There can be no doubt that corrupt practices in the obtaining and execution of public contracts are inimical to the public welfare. In order to promote honesty in contracting, New York has enacted a comprehensive program. State policy with respect to the letting of public contracts is typified in N. Y. State Finance Law, § 174, providing, *inter alia*, that such contracts:

> "shall be let to the lowest responsible bidder, as will best promote the public interest, taking into consideration the reliability of the bidder, the qualities of the articles proposed to be supplied, their conformity with the specifications, the purposes for which required and the terms of delivery; provided, however, that no such contract shall be let to a bidder, other than the lowest responsible bidder without the written approval of the comptroller . . . Each bid with the name of the bidder shall be entered of record and each record, with the successful bid indicated, shall be open to public inspection."

To the same effect are, *e.g.*, N. Y. General Municipal Law § 103; N. Y. Highway Law, § 38; N. Y. Education Law, § 2556(10); See also N. Y. Public Housing Law, § 151. It is of the highest importance in New York that there be no collusive bidding or bid rigging for public contracts. Thus, every public contract requires proper assurance to that effect as one of its conditions. See *e.g.*, N. Y. Gen-

eral Municipal Law, § 103-d; N. Y. Public Authorities Law, § 2604; N. Y. Public Housing Law, § 151; N. Y. State Finance Law, § 139-d. The federal requirement is similar. A "certificate of independent price determination" clause must be set out in almost all bids for government contracts. 41 C.F.R. § 1-1.317.

The object of the New York bidding laws is "the benefit and protection of the public". *Matter of Zara Contracting Co. Inc.* v. *Cohen*, 45 Misc. 2d 497, 499, 257 N.Y.S. 2d 479 (Sup. Ct. Albany Co. 1964), *aff'd.* 23 A.D. 2d 718, 257 N.Y.S. 2d 118 (3rd Dept.), *lv. to app. den.* 16 N.Y. 2d 482 (1965). A determination as to the lowest responsible bidder, for example, requires a determination of "integrity and moral worth". *Matter of Caristo Constr. Corp.* v. *Rubin*, 30 Misc. 2d 185, 198, 221 N.Y.S. 2d 956, 969 (Sup. Ct. Kings Co.), *aff'd.* 15 A.D. 2d 561, 222 N.Y.S. 2d 998 (2d Dept. 1961), *aff'd.* 10 N.Y. 2d 539, 225 N.Y.S. 2d 502; *Matter of Arglo Painting Corp.* v. *Board of Education*, 47 Misc. 2d 618, 620-21, 263 N.Y.S. 2d 124 (Sup. Ct. Kings Co. 1965); *Picone* v. *City of New York*, 176 Misc. 967, 29 N.Y.S. 2d 539 (Sup. Ct. N.Y. Co. 1941); *Matter of Limitone* v. *Galgano*, 21 Misc. 2d 376, 189 N.Y.S. 2d 738 (Sup. Ct. Westch. Co. 1959). Almost all federal government contracts must contain a provision that the contractor agrees to let the Comptroller General and his representatives examine all records directly pertaining to and involving transactions relating to the prime contract of subcontract for a period of three years from final payment. 10 U.S.C. § 2313(b); 41 U.S.C. § 254(c). And the federal contracting officer must be able to assess the responsibility of the contractor. 41 C.F.R. §§ 1-1.1200-1-1.1207.

In order to determine whether or not bidders and contractors are responsible, the State must be able to insure candor on the part of public contractors and to protect the public from persons or corporations which refuse to be candid in their public dealings. This was precisely the

legislative purpose in enacting General Municipal Law, §§ 103-a, 103-b, Public Authorities Law, §§ 2601, 2602 and similar statutes.*

In approving this legislation, Governor Rockefeller pointed out:

> "Unlike a private person who may contract with whom he wishes, a public agency usually lets contracts by public auction and is required to accept the lowest bid. For that reason, it would seem appropriate to disqualify the bids of persons who are unwilling to disclose to a grand jury facts relating to some prior contract with the public. Likewise, it would seem appropriate that public contracts should provide that the benefits accruing under them be available only so long as the beneficiary is willing, when required by a grand jury, to disclose any information he may have as to a public contract." Memorandum of the Governor, New York State Legislative Annual (1959), p. 431.

See *United States* v. *Acme Process Co.*, 385 U.S. 138, 144 (1966).

There is, thus, a strong state policy and interest in honest contracting. It is a *sine qua non* of overseeing contractors that they be required to supply appropriate officials with continuing information with respect to their contracts. "[I]t would be difficult to gainsay the reasonableness of the state's effort to impose legislatively upon those with whom it does business a continuing duty of candor and disclosure concerning their transactions with the state". *Holland* v. *Hogan*, 272 F. Supp. 855, 869 (S.D.N.Y. 1967) (3 Judge Court), *remanded* 392 U.S. 654 (1968). See also *Copper Plumbing & Heating Co.* v. *Campbell*, 290 F.

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* N. Y. State Finance Law § 139a, -b; N. Y. Public Housing Law, § 151.

2d 368 (D. C. Cir. 1961); *United States ex rel. Laino* v. *Warden*, 246 F. Supp. 72, 93-94 (S.D.N.Y. 1965), *aff'd.* 355 F. 2d 208 (2d Cir. 1966). Indeed, in dealing with public contractors, this Court long ago held, in *McMullen* v. *Hoffman*, 174 U.S. 639, 651 (1899), that public contracts cannot be surrounded with too many precautions directed at obtaining perfectly fair and bona fide bids. And, the contents of the Legislative intent are known in advance of entering into any contract.

Notwithstanding that the New York statutes requiring either unconditioned testimony or discontinuance of the business relationship are an integral part of the legislative intent to secure honest contracting, the court below, in overbroad reliance on the decisions of this Court, particularly on *Gardner* v. *Broderick*, 392 U.S. 273 (1968), held that the statutes represent an impermissible burden on the privilege against self incrimination. In so doing, the Court did not even mention two vitally important and independently distinguishing factors. The first is that the discontinuance of the business relationship on a refusal to waive immunity is precisely what appellees contracted for.* The second is that contractors are not in the same position as either public employees or licensees with respect to the State. In short, what the Court below regarded as falling squarely within *Gardner* v. *Broderick*, *supra* is, in reality, an unwarranted extension of the rule in that case.

New York General Municipal Law, § 103-a and New York Public Authorities Law, § 2601 do not require anyone to

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* Appellants suggested in the jurisdictional statement that appellees' belated assertion in a memorandum by law to the District Court the stadium contract did not contain the clause required by § 103-a might merit exploration on a remand to the District Court. A closer reading of the complaint reveals, however, that appellees claimed that their partnership had "various contracts" with Erie County subject to § 103-a, a claim admitted by appellant Tutuska (A. 26). Accordingly, on the present record, it must be assumed that the clause existed.

contract to waive immunity against prosecution. They do require each contract to provide that refusal to waive such immunity will lead to a five-year disqualification from further contracting and may lead to a cancellation of existing contracts. The insertion of such clauses in public contracts is a traditional means of assuring contractor accountability as to both the quality of the work and the integrity with which it is done. See WIGMORE, Evidence, Vol. VIII, Sections 2272, 2275 (McNaughton rev. 1961); *United States ex rel. Laino* v. *Warden, supra.* To obtain an economic benefit by securing contracts let by competitive bidding, contractors agree to certain consequences if they refuse to be candid about those contracts. Such a clause is binding. As this Court held in *Zap* v. *United States,* 328 U.S. 624, 628 (1946):

> "[T]he law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But these rights may be waived. And when petitioner, in order to obtain the Government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts."

See also, *United States* v. *Biswell,* 406 U.S. 311, 316 (1972), relying on the fact that a dealer in a closely regulated business knows, when he enters the business, that he must submit to certain forms of inspection. The enforcement of candor by a refusal to do business is one of the few defenses available to a State against an unlawful drain on its resources. In fact, refusal to do business is the most reasonable recourse available.

If a clause is valid when inserted into a contract, it is no less valid when it is sought to be enforced. Certainly the clause was not in and of itself invalid. *Zap* v. *United*

*States, supra.* And, it was reasonably related to an important state interest. See, *e.g., Perkins* v. *Lukens Steel Co.*, 310 U.S. 113 (1940); *People* v. *Crane*, 214 N.Y. 154, 168, *aff'd. sub. nom. Crane* v. *New York*, 239 U.S. 195 (1915); *Atkin* v. *Kansas*, 191 U.S. 207 (1903); Walsh-Healey Act (41 U.S.C. §§ 35, 45). *Cf. Frost Trucking Co.* v. *R. R. Comm.*, 271 U.S. 583 (1926), in which the regulation was held not reasonably related to the announced stautory purpose.

At the time the contract is offered, the contractor has the option to agree or to refuse. The only thing he loses by refusal is future economic gain from this source. Once he agrees to the terms of the contract and accepts its benefits, he must comply with it or it is breached. He cannot accept the benefits and disregard the obligations. *Fahey* v. *Malonee*, 332 U.S. 245, 255-56 (1947); *Ashwander* v. *Tennessee Valley Authority*, 298 U.S. 348 (1936) (concurring opinion); *Booth Fisheries* v. *Industrial Comm.*, 271 U.S. 208 (1926); *Buck* v. *Kuykendall*, 267 U.S. 307 (1925).

In *United States* v. *Field*, 193 F. 2d 92 (2d Cir.) *cert. denied* 342 U.S. 894 (1951), upholding contempt convictions of bail bondsmen who refused to reveal their records notwithstanding that they had contracted to waive their privilege against self-incrimination. The bondsmen's special relationship to the Court was held to justify specific enforcement of a contract clause waiving the privilege (see WIGMORE, *supra*, § 2275). Here, the contract clause involved does not require waiver of the privilege; the privilege was not waived and no testimony was compelled. See *Wyman* v. *James*, 400 U.S. 309, 317-18 (1971). The only result was one for which appellees had opted.

Moreover, if appellees believed the condition unreasonable and regarded themselves as otherwise entitled to the contracts, the time to complain was *before* they were signed. The means for voicing such a complaint was a proceeding in the nature of mandamus pursuant to Article

78 of the New York Civil Practice Law and Rules. See, *e.g., Dictaphone Corporation* v. *O'Leary,* 287 N.Y. 491, 41 N.E. 2d 68 (1942). Having failed to complain at the outset, the appellees cannot complain now.

The second vital area in which the District Court failed to distinguish between this case and *Gardner* v. *Broderick, supra,* lies in the differences, even apart from any explicit waiver clause in the contract, among public contractors, public employees and mere licensees. First, the contractor's relationship to the State places on him as high a degree of accountability as that falling on the public employee and a higher degree of accountability than would fall on him by virtue solely of any license he might also have (see pp. 7 to 10, *supra*). See *Spevack* v. *Klein, supra,* at 520 (FORTAS, J. concurring).

Second, under New York law, the consequences for failure to discharge the reasonable obligation are much less severe than those sought to be imposed on public employees, as to whom the obligation was nevertheless reasonable (*Gardner* v. *Broderick, supra* at 278) and also much less severe than those imposed on licensees, as to whom the initial obligation was not reasonable (*Spevack* v. *Klein, supra*). These consequences do not constitute an impermissible burden on the privilege against self-incrimination. Unlike a policeman whose refusal to waive immunity would have resulted in the loss of his profession, his career and his livelihood, and unlike an attorney whose refusal to answer questions would have resulted in the loss of license, the means by which he practices his profession and earns his living,* the contractor loses, for a limited period of time, certain but by no means all of his business opportunities. See *Minor* v. *United States,* 396 U.S. 87 (1969). His license

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* Indeed, there is some authority for the proposition that public employment and, to an important degree, licensure are rights. See *e.g. Konigsberg* v. *State Bar,* 366 U.S. 36 (1961); 73 Col. L. Rev. 882 (1973). No such claim can be made for the contractor.

is unaffected; he may continue to practice his profession. *Zwick* v. *Freeman*, 373 F.2d 110 (2d Cir.), *cert. denied*, 389 U.S. 835 (1967). The consequences are lightened even further by the fact that any firm, partnership or corporation may petition to remove the disqualification on the grounds *inter alia* that he cooperated with the investigation and that the person refusing to waive immunity had a degree of financial interest in the firm such that it would not be in the public interest to cancel the contract or continue the disqualification. N. Y. General Municipal Law, § 103-c; N. Y. Public Authorities Law, § 2603.

Third, unlike the relationship of the licensee and the public employee to government, the contractor's affiliation with government is episodic, each episode being defined by a set of pre-consented rules. Accordingly, the statutes at issue, by their limitation to "contracts and transactions had with" the State, provide a much more circumscribed area of permissible questioning than did the analogous § 1123 of the New York City Charter involved in *Gardner* v. *Broderick*, *supra*, and in *Uniformed Sanitation Men* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) which required any "councilman or other officer or employee of the city" to "answer any question regarding the property, government or affairs of the city or of any county included within its territorial limit, or regarding the nomination, election, appointment or official conduct by any officer or employee of the city or of any such county". See *Gardner* v. *Broderick*, supra at 275 n. 3.

With a statute so broad in scope, this Court rejected the procedure of requiring a previous waiver of immunity but said that if Gardner had:

> "... refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity*

v. *New Jersey, supra,* the privilege against self-incrimination would not have been a bar to his dismissal." *Gardner* v. *Broderick, supra,* at 278.*

In the case of contractors, the statutory language coupled with the contracts makes the asking of specific questions unnecessary to limit the scope of the inquiry to bounds consistent with the scope of the obligation of candor and a prior waiver is permissible.**

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* There are some textual difficulties with this paragraph which is the heart of the *Gardner* decision. In stating that the privilege would not have been a bar to dismissal for refusal to answer specific questions, it seems fairly clear that the opinion means that invocation of the privilege would not bar dismissal. The problem arises when the opinion states that this is so if the officer is not "required to waive his immunity with respect to the use of the answers or the fruits thereof in a criminal prosecution of himself, *Garrity* v. *New Jersey, supra.*" There are two possible interpretations of this clause. The first is that, under the circumstances of that case, the officer could not be required to waive immunity in advance of the questions being asked. The second is that any answers he in fact gave would not be admissible in any criminal prosecution and that invocation of the privilege would not, therefore, bar his dismissal. The first interpretation is the sounder. It is consistent with the facts of *Gardner* and with the problems generated by the extremely broad language of § 1123. The second interpretation is less sound because, although the clause cites *Garrity* v. *New Jersey,* no questions were asked or answered in *Gardner* and, more important, if any answers could not be used in a prosecution, the public employee, whose high obligation of candor the Court acknowledged, would be in no different position from any other member of the public who must testify if his testimony cannot be used in a criminal prosecution. Under the second interpretation, the language in *Gardner* respecting the obligation of the public employee would have been mere surplusage. See also *Uniformed Sanitation Men* v. *Commissioner of Sanitation, supra,* at 294-85 (1968) presenting the same ambiguity as *Gardner.*

** It may be noted that the waivers which appellees were asked to sign did not refer to the scope of the inquiry. Appellees, however, have never suggested that they did not know why they were called or that they did not know the scope of the permissible inquiry.

Under these circumstances, suspension from public contracting is a proper and reasonable implementation of the duty to regulate contractor responsibility. *United States* v. *Acme Process Co., supra.* Certainly, if appellees were private contractors they could not withhold even incriminating information from the persons with whom they contracted and expect to have the contract continue or to receive business from the same source in the future. Similarly, it is reasonable for the State to seek information, even incriminating information, from their contractors. If contractors do not wish to cooperate, their privilege against self-incrimination assures that they need not do so. But there should be no further obligation on the part of the State to use and to pay for the services of contractors who will not be candid with it.

The foregoing assumes that, in evaluating whether or not the privilege against self-incrimination has been burdened or impermissibly burdened, the evaluation is achieved by a balancing of the relevant factors. Underlying the approach of the District Court is an implicit assumption that no such balancing takes place. The assumption is untenable. The most appropriate analogy is to those cases dealing with whether or not the privilege may be invoked at all in instances where the material sought does have incriminating potential. As this Court has stated:

> "Tension between the State's demand for disclosure and the protection of the right against self-incrimination is likely to give rise to serious questions. Inevitably these must be resolved in terms of balancing the public need on the one hand, and the individual claim to constitutional protections on the other; neither interest can be treated lightly."
>
> "An organized society imposes many burdens on its constituents. It commands the filing of tax returns for income; it requires producers and distributors of

consumer goods to file informational reports on the manufacturing process and the content of products, on the wages, hours and working conditions of employees. Those who borrow money on the public market or issue securities for sale to the public must file various information reports; industries must report periodically the volume and content of pollutants discharged in our waters and atmosphere. Comparable examples are legion." *California* v. *Byers*, 402 U.S. 424, 427-28 (1971) (footnote omitted).

*Byers* itself involved California's "hit and run" statute requiring a motorist involved in an accident to stop and identify himself. See also *United States* v. *Fratello*, 44 F.R.D. 444, 450 (S.D.N.Y. 1968); *State* v. *Falco*, 60 N.J. 570, 292 A. 2d 13 (1972).

The circumstances under which potentially incriminating evidence may be required depend on the substantiality of the risk involved balanced against the interest in disclosure. *California* v. *Byers, supra; Marchetti* v. *United States*, 390 U.S. 62 (1968); *Albertson* v. *SACB*, 382 U.S. 70 (1965). Nor should it be overlooked that failure to produce even potentially incriminating, but required, evidence will have serious consequences. *California* v. *Byers, supra;* see *United States* v. *Kordel*, 397 U.S. 1 (1970). If the privilege itself is subject to a balancing rationale, any consequences of asserting the privilege should be subject to the same rationale and the elements of the balance should be the severity of the consequences weighed against the interest in unconditioned disclosure. See *Napolitano* v. *Ward*, 317 F. Supp. 83, 84 (N.D. Ill. 1970). This approach has been, in fact, the one taken by this Court in declining to lay down an absolute rule in *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956) and in differentiating between what can be required of a public employee as distinguished from a licensee. *Gardner* v. *Broderick, supra; Spevack* v. *Klein, supra.* Application of this rationale to

public contractors should yield a result in favor of the New York approach struck down by the Court below.

The result is no different if the case is examined under what might be termed the metaphorical approach of the "rock and the whirlpool". *Garrity* v. *New Jersey, supra.* In the first place, the contractor, far more than the employee and licensee, has a clear chart of the waters ahead and may choose not to enter them by not bidding. The channel for the employee and the licensee is much longer and far murkier beginning when the relationship is entered into perhaps many years before and clouded by the uncertain shape of the information which may be demanded. And, should the contractor run afoul of either rock or whirlpool, he may nevertheless emerge, if not unscathed, at least far from scuttled and certainly sufficiently intact to keep afloat. The contract is the Argo of the contractor.

In short, the colorful dilemma which appellees may be expected to posit for themselves is as mythological as Scylla and Charydbis. That some dilemma may exist for contractors is clear. But not every dilemma is unconstitutional. The Constitution does not guarantee against hard choices even for those who contract with the government. See *Williams* v. *Florida*, 399 U.S. 78, 84 (1970); *Silverio* v. *Municipal Court*, 355 Mass. 623, 247 N.E. 2d 379, *cert. denied* 396 U.S. 878 (1969).

Nor should the State be required to calm the waters further. Its dilemma is more serious than that of the contractor. Under the result below, the State must either grant immunity to secure an accounting or it must forego an accounting.* The dilemma for both parties is created

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* The dilemma is particularly acute in New York because New York law accords automatic transactional immunity. N. Y. Criminal Procedure Law, § 190.40. Indeed, the Court below failed to explore the scope of the waiver of immunity sought by the statutes all of which refer only to a "waiver of immunity from prosecution'" (N. Y. General Municipal Law; §§ 103-a, 103-b; N. Y. Public

*(footnote continued on following page)*

by the relationship itself. For those citizens from whom no special accounting is owed to the State (and from whom the State has no special obligation to the public to exact an accounting), no dilemma exists. Where the special relationship exists, however, an unconditioned accounting must be available *to the extent of the relationship.* Appellees cannot be required to account for activities unrelated to their contracts but they must account for those contracts or forego them and the economic benefit they entail. For again it must be remembered that, like other citizens, appellees are not required to render an account. *Wyman* v. *James, supra.* But failure to do so must sever both the special relationship and its benefits. Any other result would deny the higher obligation of the contractor. Cf. *Garner* v. *Broderick, supra.*

## POINT II

### The decision below is not supported by the record.

The District Court enjoined the enforcement of N. Y. General Municipal Law, §§ 103-a and 103-b and N. Y. Public Authorities Law, §§ 2601 and 2602 "until rewritten." On the record before the Court, this broad result was unwarranted.

First, the complaint stated that appellees were members of a partnership which had "various contracts" with Erie County. At no time did appellees allege that they as in-

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*(footnote continued from preceding page)*

Authorities Law, §§ 2601, 2602) and do not refer to use immunity. See *Zicarelli* v. *New Jersey State Comm.*, 406 U.S. 472 (1972). See, too, the opinion of the New York Court of Appeals in *Gardner* v. *Broderick*, 20 N.Y. 2d 227, 230, 229 N.E. 2d 184 (1967), *reversed* 392 U.S. 278 (1968). The New York Court of Appeals has not interpreted the statutes in question since this Court declined to pass on their validity in *George Campbell Painting Corp.* v. *Reid*, 392 U.S. 286 (1968) although such a case is presently pending in that Court. *People* v. *Avant*, 39 A.D. 2d 389, 334 N.Y.S. 2d 768 (3rd Dept. 1972), appeal pending.

dividuals had existing contracts with the County of Erie when they were subpoenaed to appear. Accordingly, any threatened cancellation of existing contracts did not burden appellees' privilege against self-incrimination. See *George Campbell Painting Corp.* v. *Reid,* 392 U.S. 286 (1968). Whatever the impact of the future disqualification of appellees as individuals,* any existing contracts with their partnership may be cancelled.

This failure to distinguish between the contracting partnership and the individual appellees (see *United States* v. *Kordel,* 397 U.S. 1 [1970]), coupled with the District Court's broad directive to redraft the challenged statutes, creates the danger that corporations may be included in the Court's holding. Such a result has nothing to commend it, and if it had ever been intended by this Court *George Campbell Painting Corp.* v. *Reid, supra,* would not have been affirmed and *Holland* v. *Hogan,* 392 U.S. 654 (1968) would not have been remanded for reconsideration. (Contrast, *Perla* v. *New York,* 392 U.S. 296 [1968] with *Holland* v. *Hogan, supra.*) Corporations cannot avoid the statutory consequences of an officer's invocation of the privilege against self-incrimination, *United States* v. *Kordel, supra.*

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* The allegation that appellees wish in the future to secure public contracts may well not be sufficient to establish a present controversy since they do not indicate whether they have bid or are about to bid on any contracts and there is no indication that any bid they submit or could submit would be the low bid on any such contract. *Golden* v. *Zwickler,* 394 U.S. 103 (1969).

## CONCLUSION

**The Decision below should be reversed and the complaint dismissed.**

Dated: New York, New York, June 13, 1973.

Respectfully submitted,

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# APPENDIX

GENERAL MUNICIPAL LAW

Section 103-a. Ground for cancellation of contract by municipal corporations and fire districts:

A clause shall be inserted in all specifications or contracts made or awarded by a municipal corporation or any public department, agency or official thereof on or after the first day of July, nineteen hundred fifty-nine or by a fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, for work or services performed or to be performed, or goods sold or to be sold, to provide that upon the refusal of a person, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation, or fire district, or any public department, agency or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any municipal corporation or any public department, agency or official

thereof on or after the first day of July, nineteen hundred fifty-nine or with any fire district or any agency or official thereof on or after the first day of September, nineteen hundred sixty, by such person, and by any firm, partnership, or corporation of which he is a member, partner, director or officer may be cancelled or terminated by the municipal corporation or fire district without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the municipal corporation or fire district for goods delivered or work done prior to the cancellation or termination shall be paid.

The provisions of this section as in force and effect prior to the first day of September, nineteen hundred sixty, shall apply to specifications or contracts made or awarded by a municipal corporation on or after the first day of July, nineteen hundred fifty-nine, but prior to the first day of September, nineteen hundred sixty.

Section 103-b. Disqualification to contract with municipal corporations and fire districts:

Any person, who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority, or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any municipal corporation or fire district, or with any public department,

agency or official thereof, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section one hundred three-c of this article.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership, or corporation of which the person so refusing is known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the person so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.

PUBLIC AUTHORITIES LAW

Article 9—General Provisions

(Title 3-A—Contracts of Public Authorities)

Section 2601. Ground for cancellation of contract by public authority:

A clause shall be inserted in all specifications or contracts hereafter made or awarded by any public authority or by any official of any public authority created by the state or any political subdivision, for work or services performed or to be performed or goods sold or to be sold, to provide that upon the refusal by a persn, when called before a grand jury, head of a state depatment, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with any public department, agency or official of the state or of any political subdivision thereof or of a public authority, to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract.

(a) such person, and any firm, partnership or corporation of which he is a member, partner, director or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or official thereof, for goods, work or services, for a period of five years after such refusal, and to provide also that

(b) any and all contracts made with any public authority or official thereof, since the effective date of this law, by such person and by any firm, partnership or corporation of

which he is a member, partner, director or officer may be cancelled or terminated by the public authority without incurring any penalty or damages on account of such cancellation or termination, but any monies owing by the public authority for goods delivered or work done prior to the cancellation or termination shall be paid.

Section 2602. Disqualification to contract with public authority:

Any person who, when called before a grand jury, head of a state department, temporary state commission or other state agency, head of a city department, or other city agency, which is empowered to compel the attendance of witnesses and examine them under oath, to testify in an investigation concerning any transaction or contract had with the state, any political subdivision thereof, a public authority or with a public department, agency or official of the state or of any political subdivision thereof or of a public authority, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such transaction or contract, and any firm, partnership or corporation, of which he is a member, partner, director, or officer shall be disqualified from thereafter selling to or submitting bids to or receiving awards from or entering into any contracts with any public authority or any official of any public authority created by the state or any political subdivision, for goods, work or services, for a period of five years after such refusal or until a disqualification shall be removed pursuant to the provisions of section twenty-six hundred three of this title.

It shall be the duty of the officer conducting the investigation before the grand jury, the head of a state department, the chairman of the temporary state commission or other state agency, the head of a city department or other city agency before which the refusal occurs to send notice of such refusal, together with the names of any firm, partnership or corporation of which the person so refusing is

known to be a member, partner, officer or director, to the commissioner of transportation of the state of New York, or the commissioner of general services as the case may be, and the appropriate departments, agencies and officials of the state, political subdivisions thereof or public authorities with whom the persons so refusing and any firm, partnership or corporation of which he is a member, partner, director or officer, is known to have a contract. However, when such refusal occurs before a body other than a grand jury, notice of refusal shall not be sent for a period of ten days after such refusal occurs. Prior to the expiration of this ten day period, any person, firm, partnership or corporation which has become liable to the cancellation or termination of a contract or disqualification to contract on account of such refusal may commence a special proceeding at a special term of the supreme court, held within the judicial district in which the refusal occurred, for an order determining whether the questions in response to which the refusal occurred were relevant and material to the inquiry. Upon the commencement of such proceeding, the sending of such notice of refusal to answer shall be subject to order of the court in which the proceeding was brought in a manner and on such terms as the court may deem just. If a proceeding is not brought within ten days, notice of refusal shall thereupon be sent as provided herein.